CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 24.

THE UNITED STATES

vs.

A. GRAF DISTILLING CO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED APRIL 25, 1908.

(20221.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 271.

THE UNITED STATES

vs.

A. GRAF DISTILLING CO.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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32244—06

1 United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES, PLAINTIFF in error, *vs.* A. GRAF DISTILLING COMPANY, defendant in error.	On certificate to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Eight Circuit, sitting at the city of St. Paul, Minnesota, on the 20th day of April, A. D. 1906, certifies that the record on file in the cause above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered therein in favor of the defendant in error in the United States District Court for the Eastern District of Missouri, discloses the following facts:

On January 4, 1905, the United States district attorney for the Eastern District of Missouri, on behalf of the United States, filed in the District Court for that district an amended information praying for a decree of forfeiture, condemnation, and sale of three barrels of whiskey which had theretofore been seized by the collector of internal revenue and were still held in his possession and custody. The sole ground of seizure and forfeiture averred in the information is contained in the following paragraph thereof:

"That prior to the times of said seizure of said barrels and packages, they, and each of them, had been purchased and received by A. Graf & Co., they then being stamped, branded, and marked so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit, a United States gauger. That afterwards and before said seizure said barrels and packages, and each of them, and the contents therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sales last aforesaid, containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue as aforesaid, to wit, burnt sugar, commonly called caramel, which had been added to and placed in said spirits before said last-mentioned sales thereof, in violation of section 3455 of the Revised Statutes of the United States, whereby and by force of said statute said barrels and packages and all the contents thereof became and are forfeited to the United States."

2 The other averments of the information showed due compliance by the collector with the requirements of section 3460 of the Revised Statutes in respect of duplicate lists, appraisement, attestation, and the publication of notice; also the appearance of the claimant, its claim of ownership, and the filing of the bond; also the transmission of all of the papers in the case to the United States district attorney for proceedings thereon.

The claimant, as the A. Graf Distilling Company, appeared in the cause and demurred to the information upon the ground that it was insufficient in law to authorize a decree of forfeiture. The demurrer was sustained by the District Court, and the United States declining to plead

further, it was adjudged that the barrels of whiskey be restored to the claimant. The ground of decision of the District Court was that the purpose of section 3455, Revised Statutes, is to prevent the disposition of packages stamped, branded, or marked, when empty or when containing a taxable substance other than the contents which were therein when they were so lawfully stamped, branded, or marked by an officer of the revenue; and that burnt sugar or caramel not being taxable is not within the meaning of the phrase "anything else" as employed in the section referred to.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented by the assignment of errors, and that the decision thereof is indispensable to a correct determination of the cause and to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

1. Does the sale of a barrel of whiskey, stamped, branded, and marked so as to show that the contents have been duly inspected, and that the tax thereon has been paid, into which burnt sugar or caramel has been introduced after such stamping, branding, and marking by an officer of the revenue, authorize a seizure and forfeiture thereof to the United States under the provisions of section 3455 of the Revised Statutes of the United States?

2. Does the phrase "anything else" as employed in section 3455 of the Revised Statutes include substances that are not in themselves
3 taxable under the laws of the United States?

WALTER H. SANBORN,
WILLIAM C. HOOK,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

April 20, 1906.
Filed Apr. 20, 1906. John D. Jordan, clerk.

4 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of The United States of America, plaintiff in error, v. A. Graf Distilling Company, No. 2233, December term, 1905, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, this twentieth day of April, A. D. 1906.

[SEAL]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. December term, 1905. No. 2233. United States of America, plaintiff in error,

vs. A. Graf Distilling Company. Certificate of questions to the Supreme Court of the United States. Supreme Court U. S. Office of the clerk. Received Apr. 25, 1906. Filed Apr. 20, 1906. John D. Jordan, clerk.

5 (Indorsement on cover:) File No., 20221. U. S. Circuit Court Appeals, 8th Circuit. Term No. 271. The United States vs. A. Graf Distilling Company. (Certificate.) Filed April 25th, 1906. File No., 20221.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES
v.
A. GRAF DISTILLING COMPANY. } No. 24.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is before the court upon the following certificate of the United States Circuit Court of Appeals for the Eighth Circuit:

> The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the city of St. Paul, Minnesota, on the 20th day of April, A. D. 1906, certifies that the record on file in the cause above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered therein in favor of the defendant in error in the United States District Court for the Eastern District of Missouri, discloses the following facts:
>
> On January 4, 1905, the United States district attorney for the Eastern District of Missouri, on behalf of the United States, filed in

the District Court for that district an amended information praying for a decree of forfeiture, condemnation, and sale of 3 barrels of whisky which had theretofore been seized by the collector of internal revenue and were still held in his possession and custody. The sole ground of seizure and forfeiture averred in the information is contained in the following paragraph thereof:

"That prior to the times of said seizure of said barrels and packages they, and each of them, had been purchased and received by A. Graf & Co., they then being stamped, branded, and marked so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit, a United States gauger. That afterwards and before said seizure said barrels and packages, and each of them, and the contents therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sales last aforesaid, containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue as aforesaid, to wit, burnt sugar, commonly called caramel, which had been added to and placed in said spirits before said last-mentioned sales thereof, in violation of section 3455 of the Revised Statutes of the United States, whereby and by force of said statute said barrels and packages and all the contents thereof became and are forfeited to the United States."

The other averments of the information showed due compliance by the collector with the requirements of section 3460 of the Revised Statutes in respect of duplicate lists, appraisement, attestation, and the publication of notice. They further showed the appearance of the claimant, its claim of ownership, and the filing of the bond; also the transmission of all the papers in the case to the United States district attorney for proceedings thereon.

The claimant as the A. Graf Distilling Company, appeared in the cause and demurred to the information upon the ground that it was insufficient in law to authorize a decree of forfeiture. The demurrer was sustained by the District Court, and the United States declining to plead further, it was adjudged that the barrels of whisky be restored to the claimant. The ground of decision of the District Court was that the purpose of section 3455, Revised Statutes, is to prevent the disposition of packages stamped, branded, or marked, when empty or when containing a taxable substance other than the contents which were therein when they were so lawfully stamped, branded, or marked by an officer of the revenue; and that burnt sugar or caramel not being taxable is not within the meaning of the phrase "anything else" as employed in the section referred to.

And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented by the assignment of errors, and that the decision thereof is indispensable to a correct determination of the cause, and to the end that this

court may properly decide the issues of law presented, it desires the instruction of the Supreme Court of the United States upon the following questions:

1. Does the sale of a barrel of whisky stamped, branded, and marked so as to show that the contents have been duly inspected and that the tax thereon has been paid, into which burnt sugar or caramel has been introduced after such stamping, branding, and marking by an officer of the revenue, authorize a seizure and forfeiture thereof to the United States under the provisions of section 3455 of the Revised Statutes of the United States?

2. Does the phrase "anything else," as employed in section 3455 of the Revised Statutes, include substances that are not in themselves taxable under the laws of the United States?

Section 3455 of the Revised Statutes, above referred to, provides as follows:

> Whenever any person sells, gives, purchases, or receives any box, barrel, bag, vessel, package, wrapper, cover, or envelope of any kind, stamped, branded, or marked in any way so as to show that the contents or intended contents thereof have been duly inspected, or that the tax thereon has been paid, or that any provision of the internal-revenue laws has been complied with, whether such stamping, branding, or marking may have been a duly authorized act or may be false and counterfeit, or otherwise without authority of law, said box, barrel, bag, vessel, package, wrapper, cover, or envel-

> ope being empty, *or containing anything else than the contents which were therein when said articles had been so lawfully stamped, branded, or marked by an officer of the revenue,* he shall be liable to a penalty of not less than fifty nor more than five hundred dollars. And every person who makes, manufactures, or produces any box, barrel, bag, vessel, package, wrapper, cover, or envelope stamped, branded, or marked, as above described, or stamps, brands, or marks the same, as hereinbefore recited, shall be liable to penalty as above provided in this section. And every person who violates the foregoing provisions of this section, with intent to defraud the revenue, or to defraud any person, shall be liable to a fine of not less than one thousand nor more than five thousand dollars, or to imprisonment for not less than six months nor more than five years, or to both, at the discretion of the court. And all articles sold, given, purchased, received, made, manufactured, produced, branded, stamped, or marked in violation of the provisions of this section, and all their contents, shall be forfeited to the United States.

The earlier history of the case is as follows:

On the 20th of July, 1903, an information was lodged by the United States attorney in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in which it was sought to forfeit the barrels of whisky on the ground that section 3455 of the Revised Statutes of the United States had been violated.

Each of these barrels at the time they came into the possession of the claimant at St. Louis bore a serial number, and each had thereon a warehouse and tax-paid stamp, both of which were also numbered. Each of these barrels was therefore known as a "two-stamp package."

> The information alleged as grounds of forfeiture—that afterwards and before said seizure said barrels and packages and each of them and the contents thereof, therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sale last aforesaid, then containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue, to-wit, distilled spirits of a different quality in violation of section 3455 of the Revised Statutes of the United States, whereby and by force of said statute said barrels and packages, and all the contents thereof, became and are forfeited to the United States.

An answer was filed by the claimant denying the allegations contained in the information and the cause went to trial before Judge Amidon and a jury. Evidence was offered by the Government, and allowed by the court, tending to prove that not only "distilled spirits of a different quality" had been added to the contents of the barrels, but that burnt sugar, caramel, and other coloring matter had also been added. A verdict by the jury in favor of the Government was returned and judgment upon the verdict was entered by the court.

After the Government had closed its case the claimant interposed a demurrer to the evidence, and asked the court to direct a verdict for the claimant.

In passing upon that demurrer Judge Amidon said in part:

> That brings us to the question in this case: It is charged by the Government that after the casks in question had been stamped and branded, showing the payment of the tax and the release of the packages from the warehouse, and after the cask had been stamped and branded by a gauger, in whose presence the proof of the liquor contained in the casks had been reduced showing such reduction that some foreign matter consisting of sugar or coloring matter was introduced in the cask so as to bring up the color of the liquor, and that when the cask was sold, I hold as a matter of law that if that be established, and of course I make no intimation as to whether the fact is established or not, I am now simply stating what the Government contends and not what it has shown—if that be established I hold that it makes out a violation of section 3455 and subjects the liquor to forfeiture.
>
> A motion for a new trial was denied. (125 Fed. Rep., 52.)

From this ruling of Judge Amidon the claimant prosecuted a writ of error to the Circuit Court of Appeals for the Eighth Circuit. The opinion of the court, delivered by the late Judge Thayer, is reported in 129 Fed. Rep., 329.

The case was reversed upon the ground that the information upon which the case was tried contained only the allegation that there had been added or introduced into the original package "distilled spirits of a different quality," and that this averment was not broad enough to admit evidence tending to prove that burnt sugar, caramel, or other coloring matter had also been added to the contents of the packages. For the error of the District Court in admitting such evidence the case was reversed and remanded. This was the sole ground of reversal, as will be seen by an examination of the opinion. Upon this point the court said:

> In the course of the trial considerable evidence was introduced having a tendency to show that, either at the time when the proof was reduced or subsequently, some caramel coloring matter had been put into the packages to deepen the color of the spirits; and the instruction which the trial court gave was to the effect that if anything whatever was put into the packages, other than water, they became subject to forfeiture. It is most probable, we think, that the jury found that the caramel coloring matter had been introduced into the packages, and that they had become forfeited for that reason. This presents the question whether the information was sufficient to warrant forfeiture on that ground. It did not allege that coloring matter had been put into the barrels after they were stamped, and pray for a decree of forfeiture for that

reason, but did allege that the "something else" which had been added was "distilled spirits of a different quality" than those contained in the barrels when they were originally inspected and branded. This was the precise issue tendered by the information.

After the mandate from the Circuit Court of Appeals was filed in the District Court, the United States attorney filed an amended information, one section of which is as follows:

> Second. That prior to the times of said seizure of said barrels and packages they and each of them had been purchased and received by A. Graf & Co., they then being stamped, branded, and marked, so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit, a United States gauger. That afterwards, and before said seizure, said barrels and packages and each of them, and the contents therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sale last aforesaid containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue, as aforesaid, to wit, burnt sugar, commonly called caramel, which had been added to and placed in said spirits before said last-mentioned sales thereof, in violation of section 3455 of the Revised Statutes of the

> United States, whereby and by force of said statute said barrels and packages and all the contents thereof became and are forfeited to the United States.

To this amended information the claimant interposed a demurrer, as follows:

> Comes now the A. Graf Distilling Company and says that it is the owner, and sole owner, of the three packages of distilled spirits in the said information described, and it demurs to said information, and to each and every article thereof; and for cause of demurrer says that the said information is deficient in law to authorize a decree of forfeiture, and that neither of the said articles, in said information contained, separately, nor together, constitute facts sufficient to work a forfeiture against said property seized, and claimant therefore asks judgment whether he shall further answer said information, and that the same be dismissed, and for restitution of said property.

The only issue in the case, then, is whether burnt sugar, or caramel, which is used for coloring purposes, is "anything else" than tax-paid spirits within the meaning of section 3455. The Government contends that it is, while the claimant's position is that "anything else"[2] means "any taxable substance."

ARGUMENT.

THE STATUTE IS CLEAR AND UNAMBIGUOUS AND ADMITS OF NO CONSTRUCTION.

The primary rule of statutory construction is that when the language of the statute is clear and unambiguous it admits of no construction, or the rule might be more accurately expressed by saying that where the language admits of but one meaning the task of interpretation does not arise at all. (Endlich Interpretation of Statutes, sec. 4, and cases cited; *United States* v. *Palmer*, 3 Wheat., 610, 630.)

However unjust, arbitrary, or inconvenient a statute may be, if the language is clear the court will enforce the plain meaning. To be sure if literal interpretation leads to a result obviously not intended by the legislative branch the duty of the court is, reading the statute as a whole and taking into consideration other statutes in *pari materia*, to give effect to the intention.

In the case at bar it can not be said that the language of the statute is anything but clear and unambiguous. The prohibition against selling, buying, giving, or receiving a receptacle containing "anything else" than the contents which were therein when the tax was paid is as clear as the English language can make it.

Nor does the literal enforcement of the law lead to any absurd result—harsh, it may perhaps be argued, or unfair or oppressive—but if such is the case the

remedy lies with the legislature and not with the courts. Certainly if the Congress in using the words "anything else" had meant "any taxable substance" it would have been easy to use appropriate language.

The decisions in the District and Circuit Courts holding that the addition of water to a double-stamped package constituted no violation of law arose under other sections of the statutes, and with the exception of *United States* v. *9 Casks* (51 Fed., 191) the section is not even referred to, and even in that case the statement of Judge Thayer is merely obiter.

As has been pointed out by Judge Amidon in his opinion overruling the motion for a new trial in this case, these cases merely decided that the only marks or stamps required by law were those specified in sections 3287 and 3295. The claim made by the Government was that, because the liquors at the time they were seized did not correspond as to proof with the stamps thereon, they were subject to forfeiture. The courts held that since the stamps spoke the truth at the time they were affixed to the casks, the liquors were not forfeited, and that if the contents were thereafter changed, either by natural causes or artificial means, such change would not bring the liquors within the scope of section 3289.

So far as the statement of Judge Thayer is concerned, Judge Amidon points out that the regulation of the Internal Revenue Bureau allowed the reduction of proof by adding water, if done under the supervi-

sion of a Government officer, and if certain other formalities were complied with; and while he questions the validity of this regulation, as indeed it must be questioned, he also lays down the rule that the Government, having through its officers promulgated the regulation permitting the reduction, is estopped to claim a forfeiture of liquors for an act done in conformity therewith. Obviously, however, this estoppel could not extend to the addition of coloring matter, and consequently the statement of Judge Thayer is without significance so far as this case is concerned.

Assuming *argumenti gratia*, however, that the language of section 3455 is not free from ambiguity, an application of the ordinary rules of statutory construction renders the contention of the claimant equally untenable.

The statute being a revenue law should not be strictly construed.

> By the now settled doctrine of this court (notwithstanding the opposing dictum of Mr. Justice McLean in *United States* v. *Sugar*, 7 Pet., 453, 462, 463) statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties and forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature. (*United States* v. *Stowell*, 133 U. S., 1, 12.)

The construction of these (revenue) statutes must be such as is most favorable to their enforcement. (18 Op. A. G., 246, 248.)

> Revenue statutes are not to be regarded as penal and therefore to be construed strictly. They are remedial in their character and to be construed liberally, to carry out the purposes of their enactment. (Swayne, J., *United States* v. *Hodson*, 10 Wall., 395, 406.)
>
> It is the duty of the court to study the whole statute, its policy, its spirit, its purpose, its language, and, giving to the words used their natural and obvious import, to read the act with these aids in such way as will best effectuate the intention of the legislature. (*United States* v. *100 Barr. Spirits*, 1 Dill., 49, 57.)

A study of the statutes shows very clearly that the whole spirit of the internal revenue laws is opposed to the construction the claimants would place upon the section now under consideration.

Applying the principles laid down in the cases referred to, to the case at bar, it becomes necessary to consider the revenue laws as a whole, their policy, and purpose. Manifestly their purpose is twofold; first, to levy certain taxes for the support of the Government, and, second, as an incident thereto, to provide a system for their collection and to guard against frauds on the revenue. To effectuate this second and equally important purpose the Congress has forbidden certain acts which in themselves would not constitute a fraud on the revenue, but which

render such fraud possible or difficult of detection. The whole scheme of these laws indicates a desire on the part of Congress not only to render the perpetration of such frauds difficult, but to make easy their detection by the internal revenue officers.

It is believed that a brief review of certain sections of the Revised Statutes will substantiate this contention.

Section 3279 provides that every distiller, rectifier, and wholesale liquor dealer shall keep conspicuously on the outside of his place of business a sign, the character of which is carefully specified, indicating the nature of his business. The placing of a sign of such character on a place other than one where such business is carried on is also made an offense against the law, and horses, vehicles, etc., carrying grain, molasses, or other raw material to a distillery on which such sign is not kept are liable to forfeiture, while the person receiving such materials at such distillery or carrying them to or from such distillery is liable to fine or imprisonment.

Section 3303 provides that every distiller shall keep in a book, the form of which is to be prescribed by the Commissioner of Internal Revenue, an exact entry of the kind and quantity of materials purchased by him for the production of spirits, from whom and when purchased and by what conveyance delivered at the distillery, the amount paid therefor, the kind and quantity of fuel purchased for use in the distillery, from whom purchased, the amount paid for ice and water at the distillery, the repairs

placed on said distillery or distilling apparatus, the cost thereof, and by whom and when made, and of the name and residence of each person employed in or about the distillery, and in what capacity employed. And in another book he shall make like entry of the quantity of grain or other material used for the production of spirits, the time of day when any yeast or other composition is put into any mash or beer for the purpose of exciting fermentation, the quantity of mash in each tub, designating the same by the number of the tub, the number of dry inches—that is to say, the number of inches between the top of each tub and the surface of the mash or beer therein at the time of yeasting—the gravity and temperature of the beer at the time of yeasting, and on every day thereafter its quantity, gravity, and temperature at the hour of twelve meridian; also, of the time when any fermenting tub is emptied of ripe mash or beer, the number of gallons of spirits distilled, the number of gallons placed in the warehouse, and the proof thereof, the number of gallons sold or removed, with the proof thereof, and the name, place of business, and residence of the person to whom sold.

The making of false entries, or omitting to keep or produce books, the using of false weights or measures, and the using of unregistered materials are all penalized in sections 3305 and 3306. The distiller must further make sworn returns monthly of the amount of business done by him. (Sec. 3307.)

Distilling is prohibited in any dwelling house or any yard connected with a dwelling house, in a vessel or boat, in a building where fermented liquors are manufactured, where liquors are retailed, or within 600 feet of a rectifying establishment. (Sec. 3266.)

The receiving cisterns must be large enough to hold all the spirits distilled during the day of twenty-four hours, must be so constructed that the revenue officer can pass around them and can observe the distilling operations, and must be in charge of and under the lock and seal of an internal-revenue storekeeper gauger. The keys are to be in charge of the collector, or such gauger as he may designate. The spirits can be drawn off only under the supervision of the gauger and in the presence of the storekeeper, and must be removed directly to the distillery warehouse. (Sec. 3267.)

This warehouse is to be provided at the distiller's expense, and must be situated on the distillery premises, to be used only for the storage of spirits of his own manufacture. No dwelling house and no building with a door, window, or other opening into the distillery or into any other room or building can be used. The warehouse must be under the direction and control of the collector and in charge of an internal-revenue storekeeper. (Sec. 3271.)

If the Commissioner regards the warehouse as unsafe, he may require the owner of the merchandise at his own expense to transfer it to such other ware-

house as the Commissioner may designate, the transfer to be made under the supervision of the collector or such other revenue officer as may be designated by him. If the owner fails to make such transfer within the time prescribed or to pay the expense thereof, the merchandise may be seized and sold. (Sec. 3272.)

The distillery must be kept accessible and officers have the power to enter and examine distilleries at any time of day or night. (Secs. 3275–3276.)

The distillery warehouse is to be in the joint custody of the storekeeper and proprietor, is to be kept securely locked, and shall be opened only in the presence of the storekeeper or some one designated to act for him, as provided by law, and no articles shall be received in or deliverd from said warehouse except on an order signed by the collector of the district and addressed to the storekeeper. (Sec. 3274.)

Section 3278 allows revenue officers great latitude in searching for hidden pipes.

Illicit distilling is punished not only by fine and imprisonment, but also by forfeiture of distilling apparatus, spirits, and even title to real estate on which the business is carried on. Personalty used in the unlawful business or in any other way on the premises is forfeitable also. (Sec. 3281.)

Distilled spirits must be drawn from the receiving cisterns into casks or packages of not less than 10 gallons capacity, which shall be gauged, proved, and marked by a gauger who shall indicate in wine gal-

lons and in proof gallons the contents of such packages and casks and the particular name of the distilled spirits. These packages must be immediately removed to the distillery warehouse where the gauger in the storekeeper's presence shall place upon the head of the cask or package an engraved stamp which shall be signed by the collector and storekeeper and gauger, and shall show the number of proof gallons contained therein, the name of the distiller, the date of receipt in the warehouse, and the serial number of the package. (Sec. 3287.)

Gaugers must make daily returns to the collector, giving a true account in detail of all articles gauged or proved by him, and for whom, and the number and kind of stamps used. (Sec. 3291.)

The distiller must make an entry in triplicate each month or within five days thereafter. The entry must show by whom it is made and where and when. It must also specify the kind and quantity of spirits and the amount of tax on the spirits. The distiller must give a bond, conditioned that the tax will be paid before the removal from the warehouse. If there is a loss, otherwise than by casualty, which, in the opinion of the Commissioner, is excessive, he may instruct the collector to require the withdrawal from the warehouse of such distilled spirits and to collect the tax accrued upon the original quantity of spirits. (Sec. 3293.)

Distilled spirits can be withdrawn only on application to the collector after the tax has been paid.

The withdrawal entry must specify the whole number of casks, the marks thereon, the number of wine gallons, of proof gallons, and of taxable gallons, the amount of tax on the distilled spirits contained in them at the time they were deposited in the distillery warehouse, as well as the number of gallons, wine, proof, and taxable, contained in the packages at the time of the making of the application for the withdrawal thereof. On payment of the tax the collector shall issue his order to the storekeeper in charge of the warehouse for delivery. (Sec. 3294.)

On receipt of an order from the collector for the removal of tax-paid spirits, the gauger by whom the same is inspected and gauged shall, in the presence of the storekeeper, and before the cask has left the warehouse, place upon the head thereof a stamp showing the number of tax-paid proof gallons, the serial number of the cask, the name of the person by whom the tax was paid, the person to whom and the place where it is to be delivered. The stamp is to be signed by the collector, the storekeeper, and gauger. At the time tax-paid stamp is affixed the gauger shall, in the presence of the storekeeper, cut or burn upon each cask, the name of the distiller, the district, the date of the payment of the tax, the number of proof gallons, and the number of the stamp, which cutting or burning shall be erased when the cask is empty. (Sec. 3295.)

Stamps and brands must be effaced from empty casks, and every railroad company and other trans-

portation agency is forbidden receiving or transporting empty barrels on which the stamp has not been erased. (Sec. 3324.)

Spirits can be removed only between sunrise and sunset. (Sec. 3327.)

Removing or concealing articles with the intent to defraud the United States of a tax, renders such articles liable to forfeiture, and the person guilty of removal or concealment, liable to fine. (Sec. 3450.)

A person fraudulently executing any documents required by the internal revenue laws is liable to imprisonment. (Sec. 3451.)

Possession of taxable articles for the purpose of sale, with the intent to evade the payment of taxes, is punishable by fine (sec. 3452), and the goods upon which it is sought to evade the payment of the tax, shall be forfeited (sec. 3453).

Any debt contracted for the sale of goods on which the tax has not been paid, with intent to evade the tax, is void, and the collection thereof can not be enforced in any court. And if the goods have been paid for in whole or in part, the sum so paid shall be deemed forfeited, and any person suing for the same in an action of debt, shall recover from the seller the amount collected, one-half to his own use and one-half to the use of the United States.

Then follows section 3455, the interpretation of which is at issue in the case at bar, and section 3456 which contains a blanket provision penalizing the willful doing of any act forbidden to be done, or the failure to do an act required by law.

It can not be denied that in the sections referred to it was the manifest intention of Congress to close up every loophole through which fraud on the revenue *might* be perpetrated. The Government does not ask for any forced or unreasonable construction of section 3455. While the language of the section is clear and unambiguous, and we might well rely upon that alone (*The Samuel E. Spring*, 27 Fed. Rep., 764), we feel that we can safely rest our case on the fair construction of the section in question, and of laws in *pari materia*, having in mind always the purpose for which the section was enacted.

Many of the acts forbidden could in themselves constitute no violation of law. The failure to place a sign on the outside of the distillery building, for example, obviously could not in itself constitute any fraud on the Government. Nor is the Government directly interested in the name of the individual from whom grain is purchased, nor whether it is brought to a distillery by rail, by boat, or by horse and wagon. The distiller may purchase 5 tons or 500 tons of coal for his use and the Government is not directly defrauded by a false statement as to the amount of fuel, or by a failure to make any statement at all. Numerous other instances could be cited from the statutes referred to above where acts which are clearly forbidden constitute in themselves no fraud.

In their brief before the Circuit Court of Appeals, counsel for the defendants in error referred to the

argument of the district attorney as specious because a reason he urged for the construction of the law he asked for was that it would make easier the work of the internal-revenue officers, a contention which entirely ignored the fact that section after section of the internal-revenue laws could have been enacted for no other purpose than to render more easy the detection by Government officers of fraud on the revenues.

The sections quoted above show that from the time the distiller indicates his desire to go into business until the finished whisky which has been warehoused, it may be for years, is taken out of the warehouse, every step that he takes must be under the direct supervision of a Government officer. It is not too much to say that his business is practically under the control of the Government. More than that, under the provisions of section 3272, he may be required by the Commissioner to go to great expense in transferring his merchandise from one warehouse to another, and if he fails to accomplish this within the time specified his goods may be seized and sold. Such is the policy and such the spirit of the law, and to enforce it and carry it out the Treasury Department employs an army of collectors, deputy collectors, revenue agents, storekeepers, gaugers, and clerks.

As was said by Justice Miller:

> It is very well understood, both by the courts and by the profession, as well as everyone interested in the matter, *that the collection of*

> *the internal-revenue tax in this country has required a system of legislation for its enforcement harsh beyond everything known to our history.* And it is equally well understood that, harsh as these measures are, they have been far from successful. Notwithstanding the heavy penalties denounced against the crimes which go to defraud the Government of its revenue from internal taxes, and notwithstanding the minuteness and particularity in the description of these crimes, and notwithstanding all the aids which Congress has given by legislation to the enforcement of the revenue laws, they have been very imperfectly executed, and that the Government is cheated out of perhaps one-half of its revenue, especially that from the tax on whisky and tobacco. It is not contended that the legislature has not power to make this omission or failure a felony. It is not denied that it is within their province to adopt measures as severe as this. * * * (*United States* v. *Ulrici*, 3 Dill., 532, 539.)

From these laws the Government derives a large part of the income upon which it must rely to meet its current expenses, and, as has been indicated, every effort has been made to guard against the possibility of fraud.

Assume that coloring matter could be added to tax-paid spirits, and let us see what the effect might be:

The law requires that the tax-paid stamp affixed to a barrel of spirits must be destroyed when the barrel

is empty. Suppose, however, that a liquor dealer empties a barrel, and, without destroying the stamp, disposes of it to an illicit distiller, who fills it with non-tax-paid spirits. The court will readily see that there is a strong probability that such spirits have recently been distilled, since the longer such contraband goods are kept the greater the likelihood that they will be discovered by the revenue officers. As the court will also appreciate, newly distilled spirits resulting from the condensation of the vapor arising from the stills must necessarily be pure white in color. If such liquor is found in a barrel with a tax-paid stamp attached, any revenue officer must inevitably be put on suspicion that the goods were illicitly distilled, especially if the stamp indicated that the goods had been produced some years before; and the probability of detection is consequently very great. Moreover, there is comparatively little market for white spirits for beverage purposes, and it follows that unless such spirits can be artificially colored, or the distiller is willing to risk almost certain detection by keeping them for years in charred barrels, the incentive to produce them is largely eliminated. If the law permits the addition of caramel coloring matter, fraud is made easy.

Assuming that the proof of the spirits is the same and that coloring matter has been added thereto, neither color nor proof would indicate that the whisky had been recently distilled, a fact which can be shown only by chemical analysis, which it is clearly impos-

sible for the ordinary revenue agent in the field to make. Moreover, the addition of coloring matter makes the whisky marketable, and illicit distilling then becomes profitable. It is unlikely that after all the elaborate precautions Congress has adopted to prevent fraud it should have overlooked so important a possibility of fraud on the Government. When the language of the statute is considered, it becomes patent that no such omission was made. It certainly needs no argument to distinguish between the addition of water alone, which both changes the proof and lightens the color of old marketable whisky, and the addition of caramel, which causes newly distilled whisky or alcohol to resemble old whisky in color and does not change the proof.

Any revenue officer, or even a person with a slight knowledge of whisky, could detect the former; only a chemist would be likely to discover the latter.

We reiterate, then, that if the addition of coloring matter is allowed the very purpose for which the section was enacted is swept away, and the spirit as well as the letter of the law is defeated.

More than that, the ruling of Judge Adams in the District Court entirely ignores a part of the section itself, which provides, among other things, a penalty for the mere addition of "anything else." Where the act is done "with intent to defraud the revenue, or to defraud any person," fine and imprisonment are added; and in either case the articles are to be forfeited to the United States. Thus we have, as to this portion of the statute, two distinct offenses

denounced: (1) The mere addition of "anything else," and (2) the addition of "anything else" with intent to defraud, etc. The decision below virtually ignores the first of these offenses and treats the statute as covering only the second, for the addition of a taxable substance would necessarily fall under this latter head. Such a ruling emasculates the statute and disregards the manifest intention of the legislature.

It is believed that the opinion of Judge Amidon in overruling the motion for a new trial, to the full text of which the attention of the court is respectfully invited, presents the most logical view of the statute in question (125 Fed., 52). It reads in part as follows:

> In the judgment of Congress there were many acts which ought to be prohibited because of the possibility of their being done for the purpose of defrauding the revenue. These provisions of the statute were made not for the reason that none of the prohibited acts could be done without defrauding the revenue, but because some acts falling within the class would be done for that unlawful purpose. Now, in the trial of a given case, it would be no defense that no fraud upon the revenue was in fact intended or accomplished by a forbidden act. The courts are bound to enforce the law as it is written, and not to pare down its specific mandates by a consideration of the general purpose for which the law was adopted. * * * The record shows that chemists of national reputation were in direct conflict as

to whether any sugar or caramel had in fact been added to the packages complained of. Now, if, in addition to proving the fact that "something else" had been added to the package, the Government was put to the proof of intent, and to the further proof that by the act complained of the revenue had been defrauded, an issue would be raised in which the Government could rarely make out its case. *The whole scheme of the revenue law contemplates that at every change that takes place in distilled spirits, except such as arise by natural causes, a Government officer shall be present and shall register upon the vessel containing the distilled spirits the change that is made, so that, as Judge Thayer well remarks, "the Government can readily trace the origin and history of each case, and thus prevent frauds upon the revenue."* * * * As was said by the court in *Michel* v. *Nunn* (101 Fed., 423): "If we begin to determine what sort of materials are meant, if we say that water, sugar, and blackberry juice, and orange juice, and lemon juice are not materials within the sense of the act, the trouble is to find a stopping place and show what will be a material within the meaning of the act."

* * * It is because of the difficulty of proving what has been put into the liquors, and because all the direct evidence in relation to the fraud, if a fraud is committed, would be in the control of the party who would profit by it, that Congress has wisely seen fit to forbid in unqualified terms the addition of anything, and it is impossible to find any practical criterion less absolute than the statute itself.

GOVERNMENT'S VIEW ACCORDS WITH JUDICIAL CONSTRUCTION OF REVENUE LAWS.

Bearing in mind, then, the purpose of the statute, to prevent possible frauds upon the revenue, we can well understand why it should have been drawn in such unqualified terms. Moreover, the construction contended for harmonizes with that given to other sections of the internal-revenue laws. For example, under section 3450 of the Revised Statutes, which provides for the forfeiture of all property employed in removing or concealing spirits with intent to defraud the Government, it was ruled in the case of *United States* v. *Two Bay Mules, etc.* (36 Fed., 84), that a team so used should be forfeited to the United States, notwithstanding the fact that it was clearly established at the trial that the team had been hired from the owner, who had absolutely no knowledge of the use the defendant intended to make of it.

Section 3324 provides a penalty for failing to efface the stamps and marks on any cask or other receptacle at the time the spirits are withdrawn, and also makes it an offense for any common carrier to transport any such cask or receptacle without the stamps being effaced. In the case of *United States* v. *Goodrich Transportation Company* (8 Biss., 224), the transportation company introduced testimony tending to show that the barrels in question had been stored for a long time, and were so covered with dust and dirt and water stains that the stamps were obscured and not readily discernible. The company urged the court to instruct the jury that if its agents and employees had

used reasonable care in observing the condition of the barrels when they were received for transportation the company was relieved from responsibility. The court ruled that the statute was positive in its terms, and there was only one question in the case, viz, "did these barrels have upon them stamps uneffaced, as claimed?" The jury returned a verdict in favor of the Government.

In the case of *United States* v. *Ulrici* (3 Dill., 532 *supra*), arising under the same statute, it was argued that because the section made the failure to efface the stamps and marks a felony, and imposed fine and imprisonment, therefore the failure to efface the stamps and marks must be coupled with some criminal intent or fraudulent purpose. Covering this point the court said (p. 539):

> Now it is obvious, from what I have read, that the statute itself nowhere requires in express terms that the party who failed to efface or obliterate these stamps should have done it intentionally or fraudulently. The punishment is denounced against the simple failure, and such failure is declared to be a felony, and the party is subject to the punishment appropriate to a felony.
>
> * * * * *
>
> We can not conclude, however harsh it may seem, that Congress intended that a criminal intent should be averred in a charge for failure to destroy the stamps.

Where statutes are thus drawn in unqualified terms, courts have invariably refused to place a nar-

row construction upon them, even though at times a real hardship was imposed. The remedy for harsh legislation, it has been wisely declared, is with the legislature and not with the courts. The very spirit and purpose of the revenue laws require that the contention of the Government should be upheld.

Dobbins's Distillery v. *United States* (96 U. S., 395, 401).

United States v. *Bayaud* (16 Fed., 376, 384.)

United States v. *Dobbs et al.* (Fed. Cas., 14972.)

United States v. *Fifty Barrels of Whisky* (Fed. Cas., 15091).

In the very case in which Judge Thayer said obiter that the addition of water was permissible under section 3455, he further said:

> A person can not buy a package that contains distilled spirits, already stamped and branded, and remove the contents, and put in other distilled spirits, although the other spirits may have paid the tax, without rendering the property subject to forfeiture. (*United States* v. *9 Casks*, 51 Fed., 191, 193.)

If this is correct it destroys the foundation of the argument submitted by the defendant in error, for if the tax on such other spirits has been paid their addition no more constitutes a fraud on the revenue than the addition of water.

There remains only the consideration of certain points raised by counsel for defendant in error in this case in the argument before the Circuit Court of Appeals.

It was urged that since brandy is distilled spirits and there is a regulation of the Internal-Revenue Bureau allowing the addition of burnt sugar to the distilled spirits, there is no practical reason why a similar practice should not be allowed in the case of whisky. It was conceded that by section 3255 of the Revised Statutes the Commissioner of Internal Revenue is authorized, with the approval of the Secretary of the Treasury, to exempt distillers of brandy from any provision of the internal-revenue laws relating to the manufacture of distilled spirits, except as to the taxes thereon. From this the deduction was made that the Internal-Revenue Bureau did not regard the addition of caramel as likely to open the door to any fraudulent practices. The answer to this contention is fourfold: (1) At the time this regulation was adopted in 1875 the small quantity of brandy which was then produced in the country was made by farmers from their own grapes, and the regulation was adopted to enable them to color their brandy and dispose of it immediately. (2) At that time there was no provision for a bonded period. It consequently became desirable to dispose of the distilled liquor soon after it was produced. (3) The express object of the regulation was to relieve such distillers of the liability for the rectifier's tax. (4) It is of especial importance to notice that the burnt sugar had to be added before the brandy left the distiller's premises, in the presence of a United States gauger, after such brandy had been gauged and before

the tax was paid and the stamp affixed. The object of the regulation, therefore, was to allow a few small distillers, under Government supervision, a privilege important to their business. It can hardly be urged that there is any analogy between the addition of coloring matter to brandy, under the circumstances and under the restrictions named, and the addition of coloring matter to whisky at any time and in any manner the distiller may see fit.

The only other contention of importance raised by the defendant in error relates to the use of charred barrels for storing whisky in warehouses. It is urged that the only object of this practice is to give the whisky a darker color, and if the addition of coloring matter by absorption is allowed there is no reason why burnt sugar or other coloring matter may not be added directly. The argument is specious, but it fails to recognize that in a long series of enactments Congress has recognized that spirits may be put up in casks. A cask, according to the dictionaries, means a wooden package or barrel. Acting on this authority, wooden packages or casks have been universally used, and it must inevitably follow that spirits pure white in color, as newly distilled spirits are, must acquire some color from the wooden cask. The only difference in the color acquired from charred barrels or from plain barrels is one of degree. Moreover, the use of the charred barrel is for the purpose of giving flavor to the whisky, and only incidentally for coloring it. The law then authorizes coloring by natural processes

necessarily incident to the aging of the whisky, whereas it forbids the addition of coloring matter adventitiously.

SUMMARY.

The Government then submits: (1) That the statute is clear and unambiguous, and the express intention of the legislature should be given effect. (2) Even if it be conceded that there is uncertainty as to the meaning of section 3455 of the Revised Statutes, the spirit and purpose of this section, when read in connection with the revenue laws as a whole, forbid the addition of coloring matter to tax-paid spirits. (3) The construction asked for by the Government is in accordance with recognized principles laid down by the courts.

The first question certified, therefore, should be answered in the negative. This question being so answered, a reply to the second is unnecessary.

ALFORD W. COOLEY,
Assistant Attorney-General.

NOVEMBER, 1907.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

Office Supreme Court, U. S.
FILED.
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CLERK.

No. 24

THE UNITED STATES, PLAINTIFF IN ERROR

v.

A. GRAF DISTILLING COMPANY, CLAIMANT OF THREE PACKAGES OF DISTILLED SPIRITS, DEFENDANT IN ERROR

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR

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STATEMENT

The record in this case discloses the following facts:

In August, 1902, three packages of distilled spirits which had been sold by the A. Graf Distilling Company, of St. Louis, Mo., were seized in the possession of customers of the A. Graf Distilling Company, by the Collector of Internal Revenue for the First District of Missouri, upon the report and request of the Revenue Agent for that district.

The ground of seizure, as disclosed in the report of the Revenue Agent to the Commissioner of Internal Revenue, was that the package had

> "had a portion of the original contents abstracted and the amount so abstracted has been supplied by the introduction of spirits of a different quality from the spirits originally gauged therein, and the color restored by the addition of sugar coloring or prune juice."
>
> (p. 23 original record.)

The three packages were advertised for a claimant under Sec. 3460, R. S. U. S; they were duly claimed by the A. Graf Distilling Company, which gave the bond required by that section of the Revised Statutes, whereupon the libel of information was filed in Court.

The sole ground of the seizure and forfeiture averred in the information is contained in the following paragraph thereof:

> "That prior to the times of said seizure of said barrels and packages, they and each of them had been purchased and received by A. Graf & Company, they then being stamped, branded, and marked so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit: a United States Gauger; that afterwards and before said seizure said barrels and packages and each of them, and the contents therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sale last aforesaid, containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue, TO WIT: DISTILLED SPIR-

ITS OF A DIFFERENT QUALITY in violation of Section 3455 of the Revised Statutes of the United States, whereby and by force of said statute said barrels and packages and all of the contents thereof became and are forfeited to the United States."

The answer of the claimant denied that the spirits had become forfeited as alleged in the information.

At the time of the seizure nothing whatever was known of the character of the contents of the packages in question, but probable cause was sought AFTER the detention and seizure.

(pp. 44 and 45 original record.)

Clearly the moving cause of the seizure was the threat of the Revenue Agent that he would make a case against this claimant.

(p. 2 original record.)

The threat was the outgrowth of the refusal of this claimant to pay a compromise, or do what the Revenue Agent wanted it to do with reference to some previous charge, and the animus of the Revenue Agent was clearly shown from the fact that after the Commissioner of Internal Revenue had concluded to release the packages, on the ground that there was no *prima facie* case on the charge of a SUBSTITUTION OF SPIRITS, the Revenue Agent protested so strongly that he was able to prove it, that he was permitted to go on with the case.

(pp. 44 and 45 original record.)

By MR. HOUGH:

Q. When the Commissioner finally concluded to release the packages on the ground that I argued, provided the affidavit of Mr. Graf was filed that he did not do anything to the packages, what did you do to prevent it?

A. I protested strongly against it on this ground that nobody has ever accused Mr. Graf

of putting anything into those packages, nor would anybody contend that any other wholesale dealer would do it, that was not my contention, my contention was that THE STUFF CONTAINED IN THOSE PACKAGES IS NOT THE STUFF THAT WAS ORIGINALLY GAUGED IN THEM that is covered by the stamp affixed by the revenue officer.

Q. You don't understand my question.

A. That is my question, and that is my contention. (p. 45 original record.)

The evidence wholly failed to establish the charge of a substitution of spirits, or that the packages when sold, contained spirits of a different quality from those which had previously been inspected therein. (p. 72 original record.)

The plaintiff, proceeding on the theory that proof of a condition CONSISTENT with guilt, was proof of guilt, introduced testimony tending to show that claimant had purchased distilled spirits to which sugar coloring had been added, and also testimony tending to show that the color of the spirits in question was due in part to burnt sugar or caramel coloring, which must have been added to the spirts. (p. 72 original record.)

The evidence for the claimant tended to show that all distilled spirits are originally water white, and that the color which they obtain as the result of storage in charred barrels was largely caramel coloring, produced by burning a sugar which is in wood, as a result of charring the barrels, and that all tests for the purpose of determining that other caramel coloring had been added were unreliable. (p. 99 original record.)

The lower court held that though there was no evidence to support the charge of substitution of spirits, or that the package contained other distilled spirits than those which were originally inspected therein, there WAS evidence from which the jury

might infer that caramel coloring had been added to the spirits which had been originally inspected therein, and that if so, it would constitute a violation under Section 3455 of the Revised Statutes of the United States, upon which the information was based.

Over the objection of the defendant, claimant, which had asked the court to instruct the jury to find for it, the case was submitted to the jury under such instructions as led the jury to find for the plaintiff.

Upon appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the cause was reversed, upon the ground, as stated in the opinion of the Court of Appeals (129 Fed., 331), that:

> "After a careful examination of the record, we are of opinion that there was no substantial evidence offered by the Government to sustain the allegation that distilled spirits of a different quality had been put into the barrels after they were originally stamped and branded."

The Court further stating:

> "It will be observed that the information alleged that the barrels and packages in question, when sold, contained 'things else than the contents which were therein,' when the packages and barrels were stamped and branded, 'to wit, distilled spirits of a different quality.'"

When the cause was remanded to the District Court, the information was amended, so as to change the ground of seizure and forfeiture by charging that after the spirits had been duly stamped, branded, and tax paid, burnt sugar, commonly called caramel, had been added to the distilled spirits in the packages, in violation of Sec. 3455, R. S. U. S.

The amended paragraph of the information which sets out the sole ground of seizure and forfeiture, is as follows:

> "Second: That prior to the times of said seizure of said barrels and packages they and each of them had been purchased and received by A. Graf & Co., they then being stamped, branded, and marked, so as to show that the contents thereof were distilled spirits of a certain proof, which had before then been duly inspected by an officer of the revenue, to wit: a United States Gauger. That afterward, and before said seizure, said barrels and packages and each of them, and the contents therein then contained, were sold to divers persons, each of the barrels and packages at the time of the sale last aforesaid, containing things else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked by said officer of the revenue, as aforesaid, TO WIT: BURNT SUGAR, COMMONLY CALLED CARAMEL, WHICH HAD BEEN ADDED TO AND PLACED IN SAID SPIRITS BEFORE SAID LAST-MENTIONED SALES THEREOF, in violation of Section 3455, of the Revised Statutes of the United States, whereby and by force of said statute, said barrels and packages and all the contents thereof became and are forfeited to the United States."

To the amended information the claimant filed a demurrer, to the effect that the amended information did not charge that the packages contained "anything else," within the meaning of those terms as used in Section 3455, R. S. U. S.

The demurrer was sustained by the District Court, and as complainant declined to plead further, it was

ordered, adjudged and decreed by the court that judgment be entered for the claimant.

Thereupon the plaintiff prosecuted its appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from which court has come this certificate, which presents the following questions:

Does the sale of a barrel of distilled spirits, stamped, branded, and marked so as to show that the contents have been duly inspected, and that the tax thereon has been paid, into which burnt sugar or caramel has been introduced after such stamping, branding, and marking by an officer of the revenue, authorize a seizure and forfeiture thereof to the United States, under the provisions of Section 3455, of the Revised Statutes of the United States?

Does the phrase "anything else," as employed in Section 3455, of the Revised Statutes, include substances that are not in themselves taxable under the laws of the United States?

The first opinion in the case was rendered by Judge Amidon, who at the time was holding District Court for the Eastern Division of the Eastern Judicial District of Missouri.

His opinion is to be found in the 125 Fed., p. 52.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, reversing this judgment, was rendered by Judge Thayer, and is to be found in the 129 Fed., p. 329.

The judgment of the District Court sustaining the demurrer to the amended information was rendered by Judge Adams. A feeling of delicacy upon his part has prevented the publication of his opinion, but it was set out in the transcript of the record filed in the United States Circuit Court of Appeals, by the District Attorney, and was as follows:

"In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

The United States

v.

Three Packages of Distilled Spirits

Memorandum

"Adams, Judge:

"I think the true meaning of Section 3455, under which the information in this case is lodged, is to prevent the selling or purchasing of packages which are empty, or which contain a taxable substance other or different from that which was in them when stamped or branded. The section must have a reasonable construction and this must be given to it in the light of the spirit and purpose for which it was enacted. This section came from the Act of June 13, 1866, and that was an amendment of the Act of June 30, 1864. The object of both those acts was to raise a revenue. Accordingly, Section 3455 must be construed as a revenue measure. Burnt sugar or caramel is not taxable. Putting this article into whisky could not be regarded as an attempted evasion of the revenue acts. It is admitted in argument that the only purpose of doing it was to give the whisky a color. It does not and can not change the proof of the contents of the package. The whisky is the same in proof after the introduction of the caramel as before. Its substance is not changed at all. These facts are admitted in argument, but it is contended that the INTRODUCTION OF ANYTHING, however unrelated it may be to the general object of the law, into the package, subjected it to forfeiture. Such, in my opinion is not the true or natural meaning even of the words employed. The section enacts that no one shall sell an

empty package or one containing anything else than its first contents. These two prohibited acts must be read together. The first is to prevent the sale of empty packages after they have been once inspected, stamped, and branded. The second is akin to this and prevents the using of such packages a second time for the sale of other articles, that is: other articles within the purview of the revenue acts; other articles subject to taxation.

"A package first containing 'smoking tobacco made exclusively of stems and not mixed with leaf or leaf and stems, was taxable under the original act at fifteen cents per pound.' Assuming that such is the tax for that particular article now, this article can not be emptied in whole or in part from the package, for the purpose of putting into the package 'smoking tobacco made with all the stems on,' which is taxable at twenty-five cents per pound. In like manner packages of spirits of the first proof, which are taxable at a certain figure, can not be emptied so as to refill the same for sale with different spirits taxable at a different figure. In other words, if I make myself understood, Congress, in all the legislation concerning internal revenue taxation, is dealing with divers and many articles subject to tax, and only with articles subject to tax, and its language employed in the section under consideration, preventing the selling or buying of packages 'containing anything else than the contents of the packages,' when inspected and stamped, should be read in the light of the maxim *ejusdem generis*, and should be limited to articles of the same class, that is, to taxable articles which might, by putting them into packages once used, escape the payment of the tax imposed upon them.

"The purpose of Section 3455 obviously is to protect the revenue, but I can not give my consent to a construction of the statute, which would impose the heavy criminal penalties as well as forfeitures of property upon a party for doing an act which in no way defrauds the Government, unless such act is, by clear and unambiguous language, made a ground of forfeiture. The argument of convenience is relied upon by the Government to the effect that permission given to put in caramel and sell the goods colored thereby, would open the door to fraudulent practises, and make it much more difficult to detect violations of the revenue law; that such violations would be rendered more easy of accomplishment and less liable to detection by the opportunity of doing the act which is now charged to be an offense in this case. The only answer to this argument is: That if the act complained of is not unlawful, it can not be made so because the practise, however lawful, would render unlawful acts convenient.

"It has been held for a long time that the addition of water to tax paid and stamped whisky is not a violation of statutes kindred to 3455. I need not refer to these decisions. Counsel are familiar with them. If water is not embraced within the general language, 'anything else,' for the reason that it is not taxable (United States *vs.* Nine Casks of Whisky, 51 Fed., 191), then it is impossible to conceive that an undutiable article, like caramel, which has no effect whatever upon the proof of the spirits with which it may be mixed, but operates merely to change its color, can be embraced within these words.

"I think a strong reason in support of the conclusion reached in this case is found in a consideration of prior legislation. Without decid-

ing that Section 3455, which was Section 16 of the Act of July 13, 1866, was repealed by the Act of 1868, so far as it embraced the subject of distilled spirits (which for many reasons is a plausible view to be taken,) reference may be made to Sections 39 and 43, of the Act of July 20, 1868, which are Sections 3324 and 3326, of the Revised Statutes, for light in construing the provision of the Act of 1866, now known as Section 3455. The Act of 1868 seems to deal exclusively with the subject of taxation of distilled spirits and tobacco. Its title is 'An Act imposing taxes on distilled spirits and tobacco, and for other purposes.' The prior acts of 1864 and 1866 (13 Stats., 223, and 14 Stats., 98), relate generally to providing internal revenue on any and all subjects, INCLUDING tobacco and spirits, but as already said the Act of 1868 makes the subject of distilled spirits and tobacco a separate matter and deals with these subjects exhaustively.

"Section 3326, being Section 39, of the Act of 1868, provides that whenever any person puts into any casks or packages spirits of greater strength than is indicated by the inspection marks thereon, or fraudulently uses any cask or package, or any inspection mark or stamp thereon for the purpose of selling other spirits, or spirits of quantity, or quality, different from the spirits previously inspected therein, he shall forfeit the property and pay a fine and be imprisoned according to the provisions of that act.

"Suppose now it be true that Section 3455, in so far as it is claimed to relate to distilled spirits, or tobacco, is not repealed by the exhaustive treatment of these same articles by the Act of 1868, it is observed that Section 3326 is dealing with the same subject-matter as the Government now claims is dealt with by Section 3455,

and dealing with it in name or exact description as distilled spirits. In Section 3326 it is manifest that Congress undertakes to prevent the use of any casks or packages with stamps or inspection marks on them for the purpose of selling something else than the contents that were in it prior to it being stamped or marked. Now, what is that something else? It is here defined to be just what Judge Thayer, in the case of United States *vs.* Nine Casks and Packages of Distilled Spirits (*supra*), says is contemplated by Section 3455, namely: 'other spirits or spirits of quantity or quality different from the spirits previously inspected therein.' Giving this Section 3326 a consideration which is certainly permissible as being kindred legislation to that under consideration, it shows that Congress thought what should be avoided in the sale of packages, that had once been marked and stamped, was the use of such packages for the purpose of selling other spirits; that is, other taxable articles.

"And, so, from a consideration of cotemporaneous legislation, I am satisfied that Congress meant by the provisions of Section 3455 in question, prohibiting the sale or purchase of any packages, etc., containing 'anything else than the contents,' etc., to embrace in the words, 'anything else,' any article or thing different, in contemplation of the article subject to internal revenue taxation, from what was in the package when it was stamped and marked.

"Because, therefore, the information in this case fails to state that there was anything else of a taxable kind within the purview of the revenue acts, contained in the packages in question when they were sold, the information states no case of forfeiture.

"I am embarrassed, as counsel may well see, from the fact that my colleague, Judge Amidon, has taken a different view of this matter. He presided in court at the time the case was tried on a different information, and while that information did not involve a consideration of the subject of burnt sugar or caramel, as is now involved, Judge Amidon carefully considered what would be the law if that article was involved. For his opinion I have very great respect and have not (made) up my mind to take a different view from him, except after a most careful consideration of the legislation and judicial authorities on this subject. If the charge in the information before Judge Amidon had been based on the selling of a package containing caramel, when the same was not in the package at the time the stamps were placed on it, I would follow his ruling, but I do not feel constrained to do so in this case inasmuch as the present case is based upon a totally different charge, and one about which Judge Amidon might properly enough entertain different opinions from what he expressed, obiter, in the case before him.

"I think the demurrer to this information should be sustained."

BRIEF AND ARGUMENT

A consideration of the elaborate system of Congressional enactments, known as the United States Internal Revenue Laws, makes it apparent that the primary object of those laws was to secure to the Government the Internal Revenue taxes, provided for therein, and to prohibit and punish acts done for the purpose of defrauding the Government out of the tax, or the doing of which was specifically prohibited by Congress on the theory that their prohibition was necessary to protect the Government in the revenue attempted to be secured.

These laws should be construed in the light of the purpose for which they were enacted.

A large part of this elaborate system relates to the collection of the tax upon distilled spirits and the collection of special taxes from those engaged in the manufacture and sale of distilled spirits.

A reference to this part of these laws discloses a system of stamping, marking, and branding, whereby each change made in the contents of packages of distilled spirits, of which the law intended to take notice, is indicated by a change in the stamps, marks, or brands.

The object of the laws being taxation rather than regulation, it is manifest that only those changes in the contents of packages were intended to be noticed by the law, the making of which subjected such person making them to the payment of a special tax; or the making or doing of which was specifically prohibited upon the theory that it might open the door to a fraud.

But, in seeking a forfeiture, or the imposition of fines, penalties, or imprisonment, specific authority therefore must be found in the law itself, and such a proceeding can not be sustained upon the theory that permission for the doing of the specific act alleged to

constitute an offense does not appear in the law. On the contrary, what is not SPECIFICALLY PROHIBITED by the law is to be understood as being permitted or intended to be passed unnoticed.

> "If it was intended to forfeit spirits found, in the quantities here shown, in all descriptions of unstamped vessels, it would have been easy to say so. That it was not said so, leaves no room to doubt that it was not so intended. If this were open to doubt, however, it should not be forgotten that THOSE WHO CLAIM A FORFEITURE MUST BE PREPARED TO SHOW A PLAIN WARRANT FOR IT."

United States *v.* Cask of Gin, 3 Fed., 20.
Affirmed in 5 Fed., 438.

Section 3287, R. S. U. S., indicates what marks, stamps, and brands should be placed upon packages of distilled spirits at the time the casks or packages are filled from the receiving cistern on the distillery premises.

Section 3295, R. S. U. S., provides what additional marks, stamps, and brands shall be placed upon that package of distilled spirits at the time it is tax paid and removed from the distillery warehouse.

Section 3320, R. S. U. S., in connection with the regulations issued by authority thereof, provides how packages of distilled spirits shall be marked, stamped, and branded, when filled for shipment, sale, or delivery on the premises of a rectifier.

Section 3323, R. S. U. S., in connection with the regulations issued pursuant thereto, provides how packages filled on the premises of a wholesale liquor dealer shall be marked, stamped, and branded.

Section 3318, R. S. U. S., provides that every rectifier and wholesale liquor dealer shall enter in a record book, on the same day on which he receives

any foreign or domestic spirits, and before he draws off any part thereof or adds water or anything thereto, or in any respect alters the same, full information respecting all such distilled spirits received by him; and at the time of shipping out any distilled spirits, and before they are removed from his premises, he must also enter in said book full information as to the contents and destination.

Section 3317 A, as amended by Act of July 16, 1892, provides that before a rectifier can empty a package he must give notice to the collector and submit the package to the inspection of a United States gauger, who shall duly gauge the package and make due return to the collector.

Section 3289, R. S. U. S., provides that all distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited.

Section 3324 provides that every mark, stamp, and brand upon a package of distilled spirits shall be effaced and obliterated at the time such package is emptied.

Section 3326 provides that any person who changes or alters any stamp, mark, or brand, on any cask, or package, containing distilled spirits, or puts into any cask or package spirits of greater strength than is indicated by the inspection marks thereon, or fraudulently uses any cask or package having any inspection mark or stamp thereon for the purpose of selling other spirits, or spirits of quantity or quality different from the spirits previously inspected therein, shall be subject to certain fines, forfeitures and penalties.

The law does not relate to any particular kind of distilled spirits, such as whisky, brandy, rum, or gin, but relates to ALL DISTILLED SPIRITS, and refers to them only as distilled spirits.

11

Many cases might be supposed in which it would be desirable from the viewpoint of a revenue agent to have additional laws, so as to make it easier for him to make cases; or, in the absence of such additional laws, it is equally desirable to have existing provisions of law stretched in their construction, so as to cover such cases.

It is apparent that even though some changes may take place naturally, or adventitiously in the contents of a cask or package which has been duly marked, stamped, and branded, as required by law, no notice is to be taken of such changes unless they are such as would require a change of marks, stamps, or brands; and no change in the marks, stamps, or brands is required by law, except when there is such a change in the contents of the package as would subject the person making such change to the payment of some special tax therefor.

In the case of the UNITED STATES *v.* THIRTY-TWO BARRELS OF DISTILLED SPIRITS, 5 FED., 188, it was held that the addition of water to a package of distilled spirits which had been properly marked, stamped, and branded, was not such a change in the contents as required any other or additional marks, stamps, or brands, or which subjected the person adding such water to any special tax therefor.

In the case of THREE PACKAGES OF DISTILLED SPIRITS, 14 FED., 569, the Court held that the original stamps and marks are still the proper stamps and marks for a package of distilled spirits to which water had been added. The argument of convenience was submitted in that case, as in this, the Court replying:

> "The argument is ingenious, but goes further, it seems to me, than the Court is warranted in a construction of penal statutes. * * * The

Court is not authorized to give a broad or loose construction to a penal statute, so as to work a forfeiture, where no fraud or injury to the Government is involed, MERELY THAT THE GOVERNMENT OFFICERS MAY BE AIDED IN THE DETECTION OF FRAUDS BY OTHER PERSONS IN OTHER CASES."

In the case of the UNITED STATES *v.* BARDENHEIER, 49 FED., 846, the Court said: (loc. cit., 847.)

"The second series of counts do not charge with certainty such a fraud as this clause of the statute was intended to prevent. They show, no doubt, that the defendant made use of the inspection marks to misrepresent the proof of the liquor to one of his customers, or to aid in such misrepresentation, but it is not alleged that the change in proof was due to the fact that OTHER SPIRITS had been placed in the several casks after the original inspected contents had been wholly or partially withdrawn. The reduction in proof may have been due to natural causes, or to the addition of water after a portion of the original contents had leaked out, or had evaporated. If the reduction in proof was due to the addition of water, the penalty sued for was not incurred, since no wrong was thereby done to the Government. THE PENALTY IS IMPOSED FOR THE DOING OF SOME ACT WHEREBY THE GOVERNMENT IS, OR MAY BE DEFRAUDED."

In the case of the UNITED STATES *v.* NINE CASKS AND PACKAGES, 51 FED., 191, the Court said, referring to Section 3455: (loc. cit, 193.)

"A person can not buy a package that contains distilled spirits, already stamped and branded, and remove the contents and put in other distilled spirits, although the other spirits

may have paid the tax—without rendering the property subject to forfeiture. * * * To avoid any misconception, I will say that if the fact is that the other distilled spirits referred to in the third article as having been in the packages when sold, where the same spirits that were in the barrels when the inspection took place, and the proof had been reduced by natural causes, or by the addition of water, then I should hold that a forfeiture was not incurred. Congress was legislating for the protection of the revenue, and to prevent the commission of acts that would render it easy to perpetrate frauds on the revenue, when it enacted Section 3455."

In the case of the UNITED STATES *v.* FOURTEEN PACKAGES OF WHISKY, 66 FED., 984, the Court said:

"The proof is that the packages in question were duly marked and stamped by United States gaugers on the premises of the claimant, the rectifier, in North Carolina, and that when regauged some six months thereafter, there was a divergence both in proof gallons and in wine gallons in said packages. The divergence, we think, is clearly accounted for. But if it were not satisfactorily accounted for, yet we can not see how the United States has been in any manner defrauded, or could have been defrauded, unless the spirits which had been inspected and gauged in North Carolina had been taken out of the packages, in whole or in part, and other spirits, on which the tax had not been paid, had been put in them. There is, however, no charge of this sort in the information. IN NO ASPECT OF THE CASE MADE BY THE RECORD COULD THE PLAINTIFFS RECOVER."

In the case of the UNITED STATES *v.* ONE PACKAGE OF DISTILLED SPIRITS, 88 FED., 856, the Court said:

> "Since it was in evidence that the condition of the spirits at this time of the seizure, as to volume and proof, might have been occasioned by means heretofore declared by the courts to be lawful, and all the original stamps and marks are still upon the package, no *prima facie* case was made, unless there is required by law some additional mark or stamp whenever the proof of spirits is so reduced, as aforesaid. * * * As the law, therefore, does not require any additional marks or stamps when the proof or volume of an original package of distilled spirits is reduced, either from natural causes or the addition of water, it follows that the original marks and stamps are still the proper marks and stamps for such a package; and mere evidence that the contents as to volume or proof does not conform to the volume or proof as marked on the package, without more, fails to make a *prima facie* case for seizure or forfeiture."

III

Sections 3455, R. S. U. S., has been referred to in but one case prior to the case at bar, and that was the case in 51 Fed., 191, *supra*, and therein referring to the purpose of Congress in enacting this section, Judge Thayer said:

> "The purpose is evident, to prevent persons from making, dealing in, or even handling, a class of articles so branded or stamped that they can be used in fraud of the Government, AS RECEPTACLES TO DISSEMINATE ARTICLES ON WHICH THE GOVERNMENT LEVIES A TAX; and, second, to prevent them from putting into such receptacles a product which has not paid the tax."

The statute in question creates two offenses; it punishes selling or giving away of any EMPTY package containing marks, stamps, and brands, which were originally affixed to such package, or the selling or giving away such a stamped package, the CONTENTS of which are different from the contents of such package at the time it was originally so stamped, marked, or branded.

The specific language is:

> "containing anything else THAN THE CONTENTS which were therein when such article had been so lawfully stamped, etc."

The present aspect of this controversy is as to the exact meaning of this language.

The charge made against the spirits by the Revenue Agent at the time of the seizure, as disclosed first by his letter to the Commissioner of Internal Revenue, and later by his testimony in court, hereinbefore referred to, and also by the grounds alleged in the information, which was bottomed upon this section, clearly shows the Government's first construction of the language of this section as applied to this case to have been consonant with that now contended for by the defendant in error. The packages were originally seized and attempted to be forfeited on the theory that there had been a substitution of spirits, i. e., of a taxable article, in support of which theory there was a total failure of proof.

The present contention of the Government is an afterthought, born of the failure to make a case based upon the original charge for which the spirits were seized.

Counsel for the Government contends for a literal construction of the language referred to, whereas it is contended by the claimant that a literal construction would lead to an absurdity, and that the language should be given a reasonable construction,

having in view the objects intended to be accomplished by Congress at the time of the enactment of the clause containing such language.

> *"Qui haeret in litera, haeret in cortice."*
> Broom. Max., 685.

"FOR THE LETTER KILLETH, BUT THE SPIRIT GIVETH LIFE."

II Corinthians, 3:6.

This court said in the case of the UNITED STATES *v.* KIRBY, 7 WALL., 482:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

And this Court held in that case that the statute relating to the retarding of the passage of the mail was not to be construed literally, citing with approval the cases mentioned by Puffendorf and Plowden.

In the case of FELTON *v.* UNITED STATES, 96 U. S. 699, this Court said referring to the Internal Revenue Laws:

> "The spirit and purpose of the act are not to be lost sight of in a strict adherence to its letter."

And,

> "All punitive legislation contemplates some relation between guilt and punishment. To in-

flict the latter where the former does not exist, would shock the sense of justice of every one."

And,

"The object of the law in all its stringent provisions is to prevent fraud upon the revenue, and to secure the tax levied. Here no fraud was intended by the defendants. It was so found by the jury; and, moreover, none could have been committed by them in what they did."

In the case of the HOLY TRINITY CHURCH *v.* THE UNITED STATES, 143 U. S.. 457, this Court held that the language

"service OF ANY KIND in the United States,"

was not to be construed literally in determining the effect of the act forbidding the importation of a foreigner into the United States under contract for such service.

Similar cases in this court could be multiplied, chief of which are:

Carlyle *v.* The United States, 16 Wall., 147.
Haydenfeldt *v.* Mining Company, 93 U. S., 634.
In Re Chapman, 166, U. S., 661.
Potter *v.* Hall, 189 U. S., 292.
Hawaii *v.* Mankichi, 190 U. S., 197.

In the case of the UNITED STATES *v.* TWENTY BOXES OF CORN WHISKY, 133 FED., 910, the Circuit Court of Appeals for the Fourth Circuit held that the words "ANY PERSON," in Section 3449, R. S. U. S., were not to be taken literally, but were to be understood as referring only to those persons whose business was being made subject to the provisions of the United States Internal Revenue laws.

In the case of THE ENTERPRISE, 8 FEDERAL CASES, 732, the Court said:

> "When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful, they are to have their weight in its interpretation. It will at once be conceded that no man should be stripped of a very valuable property—perhaps of his all—be disfranchised, and consigned to public ignominy and reproach, unless it be very clear that such high penalties have been annexed by law to the act which he has committed. If these principles be correct, as they are deemed to be, a court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused.
>
> "'It is more consonant to the principles of liberty,' says an eminent English judge, 'that a court should acquit when the legislature intended to punish, than that it should punish when it was intended to discharge with impunity.'
>
> "Some of these principles have been overlooked altogether or but little attended to in the argument of the cause. They are, therefore, now brought into view and will govern the court in deciding on the present appeal."

IV

Section 3455, R. S. U. S., as it stands in the statutes to-day, has no application to distilled spirits.

Section 3455 was Section 16 of the Act of July 13, 1866 (14 Statutes at Large, 152). This was an act entitled:

> "An act to reduce internal revenue taxation, and to amend an act entitled 'An Act to provide

internal revenue to support the Government, paying interest on the public debt, and for other purposes,' approved June 30, 1864, and acts amendatory thereof."

It will be seen by a reference to this act of 1866 that it covered the entire subject of internal revenue taxation, and REFERRED TO ALL THE ARTICLES which were subject to an internal revenue tax at that time.

The main features of our present Internal Revenue system, however, date back, so far as the law in relation to distilled spirits and tobacco is concerned, to the Act of July 20, 1868 (15 Statutes at Large, 125), which was entitled:

"An Act imposing taxes on distilled spirits and tobacco and for other purposes."

This act was the origin of the present system of marking, stamping, and warehousing distilled spirits.

So far as the subject of distilled spirits was concerned, it was clearly intended to be a complete revision, and Section 105 of the act specificially repealed all acts and parts of acts inconsistent with the provision of this act, but continued in force all the provisions of the existing laws in relation to proceedings for enforcing fines and forfeitures.

Sections 39 and 43 of the Act of 1868 covered every point, AS APPLIED TO DISTILLED SPIRITS, which was covered by Section 16, of the Act of 1866. These acts are now, respectively, Sections 3324 and 3326, R. S. U. S.

Section 3324 provides that the stamps and brands shall be effaced at the time the package is emptied; and Section 3326 provides punishment for any one who changes or alters any mark on any cask or package, or who puts into any cask or package spirits of greater strength, or who uses any cask or

package having any inspection mark or stamp thereon, FOT THE PURPOSE OF SELLING OTHER SPIRITS, OR SPIRITS OF QUANTITY OR QUALITY DIFFERENT FROM THE SPIRITS PREVIOUSLY INSPECTED THEREIN.

Consequently, the provisions of Section 3455, in so far as they apply to distilled spirits, were expressly repealed; and, continuing that section in the revision of 1878, of the Revised Statutes of the United States, must not be held as reviving its application to distilled spirits, but as continuing it on account of its application to other articles and subjects than distilled spirits and tobacco.

In the revision of 1878, Section 3455 is not incorporated under the subject of distilled spirits, but is placed under a separate and subsequent chapter, entitled

"PROVISIONS COMMON TO SEVERAL OBJECTS OF TAXATION"

V

If, however, Section 3455 has any application to distilled spirits, it should be construed by the rule *ejusdem generis*, and as applied to a package containing the marks, stamps, and brands indicating that DISTILLED SPIRITS had previously been inspected therein, the words "CONTAINING ANYTHING ELSE THAN THE CONTENTS, etc.," should be construed as meaning "CONTAINING OTHER DISTILLED SPIRITS than, etc."

In the case of The United States *v.* Nine Casks and Packages, *supra*, Judge Thayer, construing this section, said:

> "The purpose is evident to prevent persons from marking, dealing in, or even handling a class of articles so branded or stamped that they can be used in fraud of the Government as receptacles TO DISSEMINATE ARTICLES ON WHICH THE GOVERNMENT LEVIES A TAX."

The brief and argument of the Government in this case seem to be based on the assumption that the statute was framed to prohibit the "mere addition" of "anything else" to the contents of a stamped package, but the language of the act is not susceptible to such construction. The act punishes the sale of a stamped package containing anything else THAN THE CONTENTS of the package when it was previously inspected.

The "ANYTHING ELSE," therefore, relates to the CONTENTS and the language is to be construed as though it said "containing other contents than the contents contained in said package when it was originally stamped."

To so construe the language used as to make it prohibit the MERE PUTTING of something into a stamped package would lead to an absurdity.

The language of the act has reference to the CONTENTS which the stamped package would be said to contain at the time it was sold. The thing sought to be prohibited, and which is punished by the act, is the use of a stamped package for the purpose of selling something itself subject to tax, which was never intended to be covered by the marks, stamps, or brands appearing upon such package. This necessarily implies that the thing contained in the package, not therein at the time the package was originally stamped and marked, and for the dissemination and sale of which the stamped package was being wrongfully used, was a thing required by law to be covered by Internal Revenue stamps and marks.

A nail or a tack or a bit of leather is within the literal meaning of "anything else," and we may add, incidentally, that it is a matter of common knowledge that either would tend to effect or change the color and flavor of distilled spirits, yet none would seriously contend that if either had been purposely or accidentally dropped into a barrel of distilled

spirits, properly stamped and marked, it would work a forfeiture of such distilled spirits, or that the stamped package was then being improperly used for the purpose of selling the thing thus added. Notwithstanding the addition of the nail or tack or piece of leather, and notwithstanding the effect which such addition would create upon the distilled spirits in such package, the spirits would still be the same spirits that were originally inspected therein, and the marks and stamps thereon would still be the proper marks and stamps to cover the contents of such package.

VI

Whether the language of the statute refers to the mere addition of "anything else," or whether it contemplates that the package shall contain other contents in their entirety than the original contents, it is to be observed that neither constitutes an offense under this section.

The offense consists of the "SELLING," "GIVING," "PURCHASING," OR "RECEIVING" the package containing other contents. Therefore, so far as this section is concerned, the entire contents of a package might be removed, and the package entirely refilled, and no offense would be committed without subsequent selling, giving, purchasing or receiving of the package.

THERE IS NO UNEQUIVOCAL ALLEGATION IN THE INFORMATION THAT THE PACKAGES IN QUESTION AT THE TIME OF THE SEIZURE, CONTAINED "ANYTHING ELSE THAN THE CONTENTS WHICH WERE THEREIN WHEN SAID ARTICLES HAD BEEN SO LAWFULLY STAMPED, ETC."

Indeed, the allegation in the information, by inference, at least, is, that the packages contained precisely the SAME CONTENTS that were originally inspected therein. If the contents of the packages at the time of the seizure were the same contents which were previously inspected therein, the PACKAGES could not sensibly be said to contain "ANYTHING ELSE."

An allegation in an information that something has been added to the CONTENTS of a package is not an unequivocal allegation that the package itself contains ANYTHING ELSE than the contents which were originally inspected therein. That would depend upon whether the thing added had the effect of changing the original contents into "something else."

Whatever else may have been decided by the Court of Appeals on the first appeal in this case, it is perfectly clear from the opinion in the case (129 Fed., 329), that the Court held that even though coloring matter may have been added, the spirits still remained the same spirits, and did not become thereby "other distilled spirits" or "different" distilled spirits.

Since, therefore, THE PACKAGES contained the same distilled spirits which were previously inspected therein, the packages can not be said to contain "anything else." Being the same spirits that were originally inspected in said packages, the original stamps and marks were still the proper stamps and marks to cover the contents.

The theory upon which the forfeiture contemplated by Section 3455 is predicted is that the marks and stamps upon the package are not the proper marks and stamps to cover the "anything else" contemplated by the statute. This not only indicates that the "anything else" must be something for which an Internal Revenue stamp is required, but that it was the purpose of the law to prevent the use of the Internal Revenue stamps on a package for the purpose of disseminating and disposing of the "anything else" referred to. When burnt sugar or coloring matter is added to spirits, the SPIRITS THEMSELVES might be said to contain caramel coloring, but this can not be said of the packages, because the packages themselves can only be said to contain distilled spirits; and as these

spirits are, notwithstanding the fact that caramel coloring may have been added to them, the same distilled spirits that were originally inspected in the said packages, the stamped packages can not be said to be used for the purpose of selling caramel coloring.

Even though coloring matter had been added to the spirits, the stamped packages are not being used for the purpose of selling the coloring matter, but for the purpose of selling the original spirits which were previously inspected therein.

Should a forfeiture be decreed, therefore, upon the charge in this case, there would be presented the remarkable anomaly of forfeiting a package of distilled spirits containing every mark and stamp required therefor by law, and upon which all the Government charges had been satisfied, for an act which neither involved, nor is alleged to involve, any fraud or loss to the Government in any way whatever, and which neither involved, nor is even alleged to involve, a private fraud. Such a conclusion and result would be regarded as shocking to the English mind. Much more so to the American mind.

VII

This case involves no question as to what constitutes rectification, and the case of Michel *v* Nunn, 101 Fed., 423, is, therefore, not in point. Rectifying without payment of special tax is punishable under Section 3242 A, and what constitutes rectifying is defined by Section 3244, Third Sub-division. It might be also remarked, however, that by the latter provision of law, the mere addition of anything else to spirits does not constitute rectification, as is apparent from the reading of the section. After the decision in the Nunn case, the Treasury Department issued the following circular:

"Treasury Department,
"Office of Commissioner of
"Internal Revenue,
"Washington, D. C., August 8, 1900.

"Sir: Your letter of the 3d instant has been received, submitting that the decision of the United States Circuit Court for the Middle District of Tennessee, in the case of Stark vs. Nunn, Collector (Treas. Dec. of May 10, 1900, p. 42) is capable of the construction that either a retailer or a wholesale dealer involves himself in special tax liability as a rectifier when he simply reduces whisky by the addition of water for sale, and does not use any other material, and inquiring whether such is the construction given to it by this office.

"It is not. The addition of water to spirits only, it is held, does not change the spirits into a spurious, imitation, or compound liquor in contemplation of the third paragraph of Section 3244, of the Revised Statutes, and, therefore, the special tax of a rectifier is not required to be paid on this account.

"Respectfully,
"G. W. Wilson,
"*Commissioner.*

"To Mr. F. G. Thompson,
"Revenue Agent, New York."

Volume 3, Treasury Decisions, 1900, p. 282.

The contemporaneous departmental construction of the statute on rectification, which was enacted in 1869, is found in 10 Int. Rev. Rec., 121, and is, in part, as follows:

"To mix any material with distilled spirits, wine or other liquor, which does not result in producing either a spurious, imitation, or com-

pound liquor, is not rectification. As, for instance, though pure water is a material different from spirits, yet the addition thereof to spirits is held not to constitute rectification, as it does not result in the production either of a spurious, imitation, or compound liquor, but leaves the particular spirits the same in kind, only lower in proof. * * * It follows, therefore, that the mixing of liquors identical in kind as known to the trade, does not constitute rectification."

CONCLUSION

The opinion of Judge Adams rendered on demurrer in the District Court correctly states the law, and both of the questions certified to this court from the Circuit Court of Appeals should be answered in the negative.

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